90-964

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1990

SEABOARD LUMBER COMPANY, W. T. BURGESS LOGGING CO., INC., BIG FLAT TIMBER COMPANY, MANKE LUMBER COMPANY, MERRILL & RING, INC., TOMCO, INC., ALPINE VENEERS, INC., TIMES MIRROR LAND & TIMBER COMPANY, TAYLOR WESTBROOK, BRAZIER FOREST PRODUCTS, INC., GATEWAY LUMBER COMPANY, MT. ADAMS VENEER CO., CAPITAL DEVELOPMENT COMPANY, CASCADE RESOURCES, INC., and RHD ELMA, INC.
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Is a contract damage claim which would otherwise have to be adjudicated by an Article III court transformed into a case involving "public rights" whenever the government is the claimant?

2. Does the Seventh Amendment entitle private parties to trial by jury when the federal government asserts contract damage claims against them and they do not seek any affirmative relief?

3. Has a party who asks for no affirmative relief, and who files a complaint in the Claims Court for the sole purpose of preventing the government's unadjudicated assessment of contract damages from becoming incontestable through passage of time, invoked the "privilege of suing the government" and thereby implicated principles of sovereign immunity so as to forfeit the protection of Article III and the Seventh Amendment?

4. Does execution of a standard-form government contract operate as a waiver of objection to future changes in the law which take away constitutional rights?

5. Does a finding that a party has waived his personal right to adjudication by an Article III court dispense with the need to determine whether Congress's assignment to an Article I tribunal of exclusive jurisdiction over government contract damage actions violates the nonwaivable institutional values protected by Article III of the United States Constitution?

6. When the question of waiver has not been raised by the pleadings and the parties have had no opportunity to produce evidence on the question of intent, may a court hold that a party has waived the Seventh Amendment right to jury trial by executing a contract which mentions neither the constitutional right nor its waiver?

PARTIES AND CORPORATE AFFILIATES

All of the petitioners are named in the caption and were plaintiffs in the Claims Court and appellants in the Court of Appeals. A complete list of the plaintiffs-appellants in the consolidated proceedings in the courts below, and their parent and subsidiary corporations, follows:

Seaboard Lumber Company, whose parent corporation is PACCAR, Inc.

*W.T. Burgess Logging Co., Inc.**

*Big Flat Timber Company**

Manke Lumber Company, whose subsidiary corporation is Cascade Resources, Inc.

*Merrill & Ring, Inc.**

*Tomco, Inc.**

Alpine Veneers, Inc., whose parent corporation is Alpine Internationale, Inc.

Penn Timber, Inc., whose parent corporation is Pope & Talbot, Inc.**

Times Mirror Land and Timber Company, whose parent corporation is Times Mirror

*Taylor Westbrook**

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* No parent or subsidiary corporations which require listing under Rule 29.1.

** Penn Timber, Inc. is not a petitioner.

*Brazier Forest Products, Inc.**

*Gateway Lumber Company**

Mt. Adams Veneer Co., which is a joint venture consisting of Puget Sound Plywood, Inc. and Publishers Forest Products of Washington, Inc., whose parent corporation is Times Mirror

*Capital Development Company**

*Cascade Resources, Inc.**

RHD Elma, Inc., whose parent corporation is Conifer Pacific, Inc.

The United States, respondent here, was the only defendant.

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* No parent or subsidiary corporations which require listing under Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, which affirmed the decision of the United States Claims Court.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is reported at 903 F.2d 1560. The Circuit Court's opinion is reproduced at Appendix A. Its judgment and orders denying rehearing are reproduced at Appendix B. The appeal to that court was taken from the Claims Court's decision which is reported at 15 Cl. Ct. 366 and is reproduced at Appendix C.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its decision on May 17, 1990. On September 11, 1990 that court denied a petition for rehearing. This Court has jurisdiction to review by certiorari the decision of the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

These consolidated cases involve the validity of the Contract Disputes Act of 1978 as amended by the

Federal Courts Improvement Act of 1982. Pertinent statutory provisions, as presently codified, are reproduced in Appendix D. Validity of the statutory scheme as it affects these petitioners is challenged under Article III and Amendment VII of the United States Constitution, also reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioners are timber companies which contracted with the United States to purchase timber from national forest lands. In each case a Department of Agriculture contracting officer, representing the United States, assessed money damages against a petitioner on the ground that it had failed to cut, remove and pay for timber as required by the contract. At issue are the petitioners' right to jury trial and whether petitioners may be required to litigate their contract defenses in an Article I tribunal.

Prior to the effective date of the Contract Disputes Act of 1978, Pub. L. 95-563 ("the CDA"), when the United States asserted claims arising out of contract the United States District Courts had jurisdiction over any resulting litigation. 28 U.S.C. § 1345.[1] In the CDA Congress for the first time assigned that jurisdiction

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[1] "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

exclusively to the Court of Claims. Pub. L. 95-563, § 14(i). The Court of Claims had been, at least since 1953, a court created under the authority of Article III of the United States Constitution. *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42, 584 (1962).

The contracts involved in these cases contain dispute resolution clauses of which the following is representative:

> (a) This contract is subject to the Contract Disputes Act of 1978 (Pub. L. 95-563).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this provision.
>
> . . . . .
>
> (c) (iii) . . . A claim by the government against the contractor shall be subject to a decision by the contracting officer.
>
> . . . . .
>
> (f) The contracting officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

At the time the contracts were executed the CDA allowed a party against whom a contracting officer had assessed a damage claim to choose between appeal to an agency review board and *de novo* adjudication by the Court of Claims.

After these petitioners had signed contracts agreeing to dispute resolution under the CDA, Congress enacted the Federal Courts Improvement Act of 1982, Pub. L. 97-164 ("the FCIA"). The FCIA abolished the Court of Claims and assigned all of that court's jurisdiction over government contract disputes to the new Claims Court, created under Article I.[2] The judges of the Claims Court are not protected against Congressional reduction of their salaries. They do not have lifetime tenure. 28 U.S.C. §§ 171(a), 172(a)(b), 176(1).

In these cases, after Forest Service contracting officers assessed damages, petitioners filed complaints in the Claims Court pursuant to 41 U.S.C. § 609(a). Each complaint challenged the jurisdiction of the Claims Court and stated that the complaint was filed solely to toll the running of the statutory time limit for seeking review of a contracting officer's decision, that the real claimant was the United States, that the action was one which must be heard by a court established under the authority of Article III of the United States Constitution, and that the plaintiff was entitled to a jury trial. None of the

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[2] In the Court of Claims, pursuant to statute, the United States was always the defendant, never the plaintiff. Therefore, if a contractor wished to defend against government claims it had to file an action in that court (or obtain agency review) to prevent the contracting officer's decision from becoming final and uncontestable. That procedure, which requires a defending contractor to become a nominal plaintiff, has remained applicable in the Claims Court. 41 U.S.C. §§ 605(a), 605(b), 606, 609.

complaints asked for any affirmative relief. In each case the United States filed a counterclaim for damages. Petitioners moved to dismiss the government's counterclaims or, in the alternative, that juries be empaneled to determine those counterclaims.

In consolidated proceedings, the Claims Court denied the motions in a published opinion holding that: (1) an action for contract damages brought by the government was not an action at common law which required adjudication by an Article III court (App-37); (2) because the government is a party, such an action is a matter involving a "public right" which Congress may assign for adjudication to an Article I tribunal (App-44); and (3) it followed that petitioners were not entitled to jury trials (App-50). The Claims Court, recognizing that there were substantial grounds for a difference of opinion on these issues, certified the case on its own motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(2).

The United States Court of Appeals for the Federal Circuit granted petitioners' application for discretionary appeal. On May 17, 1990 the Court of Appeals issued a decision refusing to reach the constitutional issues. Although it affirmed the ruling below on "narrower grounds" (App-2), the Court of Appeals did not vacate the Claims Court's opinion. The Court of Appeals denied a petition for rehearing and declined a suggestion for rehearing *en banc*.

In holding that it need not reach the constitutional issues, the Court of Appeals relied on two concepts which the Claims Court had not addressed: contractual waiver of constitutional rights and sovereign immunity.

BASIS FOR FEDERAL JURISDICTION

This appeal involves constitutional challenges to the jurisdiction of the United States Claims Court. That court's jurisdiction to adjudicate contract claims asserted by the United States is provided for in 28 U.S.C. § 1491 and 41 U.S.C. § 609(a).

REASONS FOR GRANTING CERTIORARI

Introduction

These cases present fundamental questions, never answered by this Court, about the jurisdiction of the federal courts and the right to jury trial when the government asserts common-law contract claims, about the reach of the doctrine of sovereign immunity, and about the effect on constitutional rights of the standard form of government contract.

In three recent major decisions this Court has dealt with the significant separation of powers problems which arise when Congress assigns to forums other than Article III courts the task of adjudicating rights which correspond or are analogous to those traditionally

adjudicated by the common-law courts.[3] The Court has also dealt in important recent decisions with the scope of the Seventh Amendment's guarantee of the right to a jury trial and the limitations on Congress's authority to restrict that right by assigning jurisdiction to tribunals other than Article III courts.[4] The Court has made clear the close relationship between questions arising under Article III and those which arise under the Seventh Amendment in this setting. However, it has not considered the proper application of those constitutional provisions when the federal government asserts common-law claims against private parties.

Both of those constitutional provisions are at the heart of these consolidated cases, in which petitioners must defend against the government's contract damage claims. The proper resolution of these cases depends on, among other things, whether the sovereign's action against a private party for contract damages was historically a "suit at common law" (or is now properly equated by analogy to such suits) and, if the answer is "yes," whether traditional contract rights become

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[3] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833 (1986).

[4] *Tull v. United States*, 481 U.S. 412 (1987); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, 109 S. Ct. 2782 (1989); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S. Ct. 1339 (1990).

"public rights" for purposes of Article III and the Seventh Amendment merely because the government is the party asserting those rights and federal common law will be applied.[5]

Those questions have never been answered by this Court. They were properly raised and squarely presented in these cases, but were incorrectly decided by the Claims Court. The Court of Appeals employed erroneous principles of contractual waiver and sovereign immunity to avoid reaching the constitutional issues. As a result, this case also presents for review novel and important questions raised by the Court of Appeals' waiver and sovereign immunity analysis.

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[5] Depending on the Court's answers to those questions, complete resolution of these cases could also require determination whether Article III and the Seventh Amendment permit the Claims Court, a court created by Congress under Article I of the Constitution, to conduct jury trials. *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. ____, 109 S. Ct. 2782, 2794-95 (1989).

I. Congress Has Illegally Assigned Exclusive Jurisdiction Over "Suits at Common Law" to an Article I Tribunal Which Does Not Provide Jury Trials.

The cases "in Law" to which the judicial power extends under Article III are the "Suits at common law" specified in the Seventh Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). They are actions which are the same as, or analogous to, common-law actions ordinarily decided in English law courts in the late 18th century. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ___, ___, 109 S. Ct. 2782, 2790 (1989). Claims by the government for contract damages are cases "in Law" and "Suits at common law" within the meaning of those constitutional provisions. Those provisions were violated when Congress assigned exclusive jurisdiction over these common-law contract actions to an Article I tribunal where jury trials are not available.

The Claims Court, without correction by the Court of Appeals, reasoned that the government's claims in these cases were not "suits at common law" because federal contract law "did not exist at common law" (App-39).[6] The courts below totally misunderstood the

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[6] This Court has questioned whether federal law governs entirely in such cases, or whether it merely displaces state law (which the Claims Court equated with the "common law") to the extent necessary to protect the relevant federal interest. *Boyle v.*

scope of the relevant historical analysis. Under this Court's decisions a case may be governed by a body of law which did not exist at common law and nevertheless be a "suit at common law" within the meaning of the Constitution. The Court looks not for identity of the governing law but for the closest analogy to a form of action at common law, with particular attention to the remedy sought. *See, e.g., Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S. Ct. 1339 (1990) (action for back pay as damages for union's breach of duty of fair representation); *Tull v. United States*, 481 U.S. 412 (1987) (liability for civil penalty under the Clean Water Act); *Curtis v. Loether*, 415 U.S. 189 (1974) (action for damages for violation of Civil Rights Act of 1968).

Here the appropriate analogy is to actions by the crown against its subjects to collect debts arising out of contract. Such actions were instituted by an information of debt in the Court of Exchequer. The action then proceeded "as in suits between subject and subject."[7]

United Technologies Corp., 487 U.S. 500, 508 n.3 (1988).

[7] 3 W. Blackstone, *Commentaries on the Laws of England* 261*. The author explains:

> An *information* on behalf of the crown, filed in the exchequer by the king's attorney general, is a method of suit for recovering money or other chattels . . . The most usual informations are those of *intrusion* and *debt*: . . . *debt*, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal

The information of debt was one of the common-law forms of action and carried the right to trial by jury. *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961).

An historical analysis which begins and ends with the observation that "federal" law did not exist in 18th century England is not the kind required by this Court's decisions. Under a correct analysis the government's contract claims are "suits at common law" which Congress may not legally assign to the exclusive jurisdiction of an Article I tribunal. Pursuant to the FCIA, however, such a tribunal is illegally proceeding to adjudicate contract claims which are part of the proper business of the Article III courts.

A. When the Government Asserts Contract Claims Against Private Parties Who Have Not Asked for Any Affirmative Relief, the Government's Claims Must Be Adjudicated in Article III Courts.

In *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833 (1986), the Court held that separation of powers principles were not violated when Congress, having created a new statutory right as part of a specific and limited federal regulatory scheme, also allowed the parties to elect to have an Article I tribunal determine not only the statutory claims but also state-law counterclaims that arose out of the same transaction or

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statute.

(*Id.*) (emphasis in original).

occurrence. *Commodity Futures* is the only decision of this Court which can be cited in support of a Congressional power to assign to an Article I tribunal the adjudication of common-law contract claims. In each important particular, however, the analysis in that case requires a holding that adjudication by an Article III court is necessary in these and other cases in which private parties are defending against common-law claims asserted by the government.

In *Commodity Futures* the complaining litigant had waived his personal right to have claims decided in an Article III court. 478 U.S. at 849. These petitioners, however, have preserved from the outset their objections to adjudication of the government's claims against them by an Article I tribunal. The petitioners' personal right to have claims decided by judges who are free from potential domination by other branches of government is directly at issue here. It is, moreover, of particular concern in the present setting. The members of the Claims Court do not have life tenure and their compensation is not protected against reduction. The Department of Justice, which routinely represents the government before that court, is certain to be consulted about appointment and reappointment of that court's members. The potential for domination is obvious. Claims Court judges have reason to believe that their

future depends upon the good will of the government attorneys who practice before them.[8]

In the legislative scheme at issue in *Commodity Futures* Congress had not attempted to withdraw a common-law claim from the cognizance of Article III courts. Instead it had created an *alternative* forum which the parties were free to reject in favor of adjudication by an Article III court. 478 U.S. at 854-55. In these cases, however, Congress has assigned *exclusive* jurisdiction over government contract claims to an Article I tribunal.

In *Commodity Futures* the Court pointed out that when Congress authorized the Commission to adjudicate counterclaims,

> . . . its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. . . . 478 U.S. at 855.

In the FCIA, however, Congress was expressly and primarily concerned with allocating jurisdiction among

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[8] This Court has pointed out that when an official who performs tasks which are properly the work of the executive is subject to removal by another branch, there is a *presumption* of that official's desire to please which creates a separation of powers problem. *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986). Similarly, there must be a presumption of a desire to please when judges' opportunities for reappointment, or for appointment to a higher court, are likely to depend on the approval of members of the executive branch whose cases those judges are charged with deciding.

federal tribunals.[9] Jurisdiction over many kinds of cases was assigned to the Claims Court in the FCIA. Pub.L. 97-164, §§ 160, 161. Creation of that court and assignment to it of the jurisdiction of the former Court of Claims were not part of a specific and limited regulatory scheme.

Finally, in *Commodity Futures* it was important that the Commission's adjudication of common law counterclaims was incidental to, and completely dependent upon, its jurisdiction over reparation claims which had been created by the regulatory statute. 478 U.S. at 856. In these cases, however, the Claims Court's jurisdiction to decide the government's contract claims is not dependent upon or incidental to the adjudication of anything else. These petitioners have sought no affirmative relief from the government. Nothing is at issue here except the government's claims for contract damages.

Thus these cases are totally unlike *Commodity Futures*. They fall, instead, almost squarely within the unquestioned holding of *Northern Pipeline Construction*

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[9] "The Courts Improvement Act is one of the court reform bills considered by the committee during the 97th Congress as part of a comprehensive program designed to improve the quality of our Federal court system and to enhance citizen access to justice." Senate Report (Judiciary Committee) No. 97-275, November 18, 1981, p. 1, reproduced at 1982 U.S. Code Cong. & Adm. News p. 11.

Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), that Congress

> . . . may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. *Commodity Futures Trading Com'n v. Schor*, *supra*, 478 U.S. at 838-39.

The sole difference is that these "traditional contract actions" will be governed at least in part by federal rather than state law. See pp. 9-10 and note 6, *supra*. However, that difference has no constitutional significance. Cases like these were traditionally actions at common law and historically were tried in the Article III courts. This Court must make clear that withdrawal of such actions from the Article III courts violates the separation of powers values protected by that Article to the same extent as does withdrawal of state-law contract claims.

B. Parties Defending Against the Government's Contract Damage Claims Are Entitled to a Jury Trial.

An action for damages for breach of contract is legal in nature and triable to a jury. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970). The right to trial by jury exists in an action by the United States if it would exist in a similar action between private parties. *Damsky v. Zavatt*, 289 F.2d 46, 51 (2d Cir. 1961); *United States v.*

Missouri River Breaks Hunt Club, 641 F.2d 689, 692 (9th Cir. 1981). *See, generally* 9 Wright and Miller, *Federal Practice and Procedure* 70-72, § 2314 (1971). Protection of that right is and always has been especially important when the sovereign asserts a claim:

> . . . For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. . . . 3 W. Blackstone, *Commentaries on the Laws of England* 259*.

Petitioners have not acquiesced in an adjudication without a jury by asserting claims against the government. *See Granfinanciera, supra*, 492 U.S. at ___, 109 S. Ct. at 2799 and n.14; *Langenkamp v. Culp*, ___ U.S. ___, 111 S. Ct. 330, 331 (1990). Congress did not purport in the FCIA to create a new cause of action with remedies unknown to the common law nor was it attempting to cope with a problem which traditional rights and remedies were not adequate to meet. *Cf. Granfinanciera, supra*, 492 U.S. at ____, 109 S. Ct. at 2800. Rather, it assigned exclusive jurisdiction over government contract claims to a newly-created Article I tribunal as an unnoticed part of a wholesale reassignment of the former jurisdiction of an Article III court.

In *Granfinanciera* the Court said:

> . . . Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it

> attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity. 492 U.S. at ___, 109 S. Ct. at 2800.

Congress has not even relabeled the cause of action involved in these cases. It simply removed jurisdiction over government contract claims from the jurisdiction of the Article III courts without considering the constitutional implications of that change.

II. A Court Charged with Announcing the Controlling Law in Government Litigation Has Held that Private Parties May Not Defend Against Government Claims Without the Government's Consent.

A. The Court of Appeals' Holding Is Based on a Mistaken Reading of This Court's Decision in *Murray's Lessee v. Hoboken Land and Improvement Co.* and Conflicts in Principle with the Law Applied in Other Circuits.

The Court of Appeals reasoned that this Court's decision in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855), had

> . . . established that the authorization by Congress of a suit to challenge a government claim against the plaintiff can be brought only because of the consent of the sovereign . . . (App-15)

and that when petitioners filed their complaints in the Claims Court they "invoked the privilege of suing the

government" despite the fact that they had expressly disavowed any claim for affirmative relief (App-18). As a result, the court held, petitioners may not complain about any conditions which Congress has chosen to attach to that "privilege." The Court of Appeals has thus determined that "sovereign immunity" not only means that a suit *against the sovereign* requires the sovereign's consent but also means that private parties may not *defend against government claims* without such consent. Congressional provision of a forum in which to defend against government claims is, the court said, a matter of "legislative grace" (App-20). This is a startling proposition indeed. It is certainly not supported by *Murray's Lessee*.

That decision involved the government's statutory power to levy on the property of its own tax collectors who had not accounted properly for funds belonging to the United States. The opinion carefully notes the historically-recognized distinction between ordinary debtors and persons handling public revenues. 59 U.S. (18 How.) at 278. Its reasoning depends upon the government's underlying right, derived from the crown's practice at common law, to assess and collect taxes without prior adjudication. *See Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596 (1931).

In the ordinary contract setting, however, the government's rights and responsibilities are similar to those of individuals. "There is no difference . . . except that the United States cannot be sued without its

consent." *Perry v. United States*, 294 U.S. 330, 352 (1935). *And see Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 193 (1880):

> If the United States is a creditor of any citizen, or of any one else on whom process can be served, the usual, the only legal mode of enforcing payment of the debt is by resort to a court of justice . . .

Murray's Lessee does not authorize the government, by virtue of its sovereign immunity from suit, to assert and collect its damage claims from private citizens without opportunity for the alleged debtor to defend in court.[10] That decision does not mean that the government can enforce unadjudicated contract claims.[11] If that were the

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[10] If that had been the holding in *Murray's Lessee*, there would have been no need for the government to employ the contractual provisions which were at issue in *United States v. Wunderlich*, 342 U.S. 98 (1951). *Wunderlich* itself involved a claim against the government, as did *United States v. Moorman*, 338 U.S. 457 (1950), upon which it relied.

[11] Both before and after *Murray's Lessee* the government routinely invoked the jurisdiction of the district courts to attempt to enforce rights arising out of its contracts. *See, e.g., United States v. Wilkins*, 19 U.S. (6 Wheat.) 135 (1821); *United States v. Robinson*, 27 Fed. Cas. 871 (1870); *United States v. Griffith*, 26 Fed. Cas. 841 (1822); *United States v. Derringer*, 25 Fed. Cas. 833 (1851); *J.W. Bateson Co. v. United States*, 308 F.2d 510 (5th Cir. 1962); *United States v. Ulvedal*, 372 F.2d 31 (8th Cir. 1967); *United States v. Georgia-Pacific Company*, 421 F.2d 92 (9th Cir. 1970); *United States v. Idlewild Pharmacy, Inc.*, 308 F. Supp. 19 (E.D. Va. 1969); *United States v. Haymarket Veterans Uniform*

law, there would be virtually no constitutional limit to the government's ability to assert and "adjudicate" its own claims in nonjudicial tribunals created for that purpose and employing procedures of its own choice.

This serious misunderstanding of this Court's decision in *Murray's Lessee* and of the doctrine of sovereign immunity conflicts in principle with the law as applied by other circuits, which have held that sovereign immunity is not implicated when the only issues involve claims asserted by the government. *See, e.g., United States v. Wilson*, 707 F.2d 304, 312 (8th Cir. 1982) (when the United States seeks equitable relief it may be required to perform a condition precedent, including the payment of money); *United States v. Bedford Associates*, 618 F.2d 904, 920 (2d Cir. 1980) (same).

The appellate jurisdiction of the United States Court of Appeals for the Federal Circuit includes virtually all disputes arising out of government contracts. That court decides many cases to which the government is a party and proclaims the law which must be applied by the Claims Court in all of the government litigation within that court's jurisdiction. As a result of the decision in this case, the law of this influential circuit now includes a fundamental misapplication of the doctrine of sovereign immunity. Unless corrected by this Court, the

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Co., 228 F. Supp. 471 (D. Mass.), *aff'd* 338 F.2d 698 (1st Cir. 1964); *United States v. Carroll*, 212 F. Supp. 422 (W.D. Ark. 1962).

Federal Circuit's mistaken conclusion that the right to defend against a government claim is a matter of legislative grace will be perpetuated indefinitely.

B. The Court of Appeals Has Misapplied Prior Administrative Practice To Determine Constitutional Doctrine.

Prior to the CDA, some government agencies had avoided resorting to litigation on their contract claims by requiring contracting parties to agree that administrative determinations of disputes would be final and conclusive. *See United States v. Wunderlich*, 342 U.S. 98 (1951). In 1954, in the Wunderlich Act, Congress limited the scope and enforceability of such contract provisions. 41 U.S.C. §§ 321, 322. However, some agencies chose not to exercise all of that limited authority to require administrative determination of contract disputes. The Department of Agriculture itself did not provide an administrative appeal procedure for disputes which involved claims for money damages. 7 C.F.R. § 24.4(e)(3) (1979 version). Government claims for damages arising out of Forest Service contracts were adjudicated in the district courts and jury trials were available.

Nevertheless, the Court of Appeals concluded that Congress had not "taken away" the right to adjudication in an Article III court and the right to jury trials. It apparently reasoned that because those rights had

sometimes been contracted away in the past petitioners cannot claim them now (App-9).

This reasoning improperly gives administrative practice greater force than constitutional principles.

III. Contrary to This Court's Analysis in *Commodity Futures Trading Com'n v. Schor*, the Decision Below Treats as Dispositive a Purported Waiver of the Personal Right to Adjudication in an Article III Court.

The decision below conflicts with this Court's express holding in *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833 (1986). That case holds that the institutional or structural principles of Article III, which protect the independent judiciary from incursion or potential domination by the other branches of government, must be considered even if a party has waived the personal right to adjudication by an Article III court:

> . . . To the extent that this structural principle [protecting the role of the independent judiciary] is implicated in a given case, *the parties cannot by consent cure the constitutional difficulty* . . . When these Article III limitations are at issue, *notions of consent and waiver cannot be dispositive* because the limitations serve institutional interests that the parties cannot be expected to protect. 478 U.S. at 850-51 (emphasis added).

Nevertheless, the Court of Appeals, after erroneously finding a contractual waiver of petitioners' personal rights under Article III (see pp. 27-29, *infra*), ignored its duty to consider the institutional concerns which are implicated when Congress assigns authority for adjudication of contract claims to an Article I court.

IV. The Claims Court, Without Correction by the Court of Appeals, Misapplied the Public Rights Doctrine.

The Claims Court did address those institutional concerns but erroneously concluded that Article III was no obstacle to what Congress has done because actions by the United States to assert contract damage claims against private parties arise "in connection with the constitutional functions of the executive and legislative branches" and therefore involve "public rights" (App-46).

That reasoning goes much too far.[12] Congress and the executive, whether in the sphere of government contracts or in other spheres, can act only in connection with their "constitutional" functions; as branches of a

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[12] The court reasoned that when the government enters a contract it is always and necessarily acting in its "sovereign" capacity (App-46). The Court of Claims, however, had long distinguished between the government's "sovereign" acts and those taken in connection with its role as a contracting party. *See, e.g., Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978); *Piggly Wiggly Corporation v. United States*, 81 F. Supp. 819, 823 (Ct. Cl. 1949).

limited government they have no other functions. According to the Claims Court, therefore, Congress could assign every action to which the United States is a party to an Article I tribunal for decision because the action would necessarily arise "in connection with" a constitutional function of the legislative or executive branch. That understanding of the public rights doctrine erroneously authorizes Congressional encroachment into the judicial sphere. It renders meaningless a significant portion of Article III's definition of the judicial power of the United States, which expressly extends to "Controversies to which the United States shall be a Party."

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985), this Court summed up the public rights doctrine as reflecting

> . . . simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving *matters that 'could be conclusively determined by the Executive and Legislative Branches,'* the danger of encroaching on the judicial powers is reduced. . . . (emphasis added)

As examples of matters which could have been "conclusively determined by the Executive and Legislative Branches," the Court cited cases involving new rights or obligations which Congress had created

and, at the same time, had assigned to a specialized tribunal for protection or enforcement.[13]

Earlier decisions had said that the presence of the government as a party was a necessary, but not a sufficient, condition for invocation of the public rights doctrine. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977). *Thomas*, however, applied the doctrine in a specialized setting where the government was not a party. Discussing that holding and the principles established by its prior decisions this Court has recently said:

> . . . Congress may devise novel causes of action involving public rights free from the

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[13] *Crowell v. Benson*, 285 U.S. 22 (1932) (seaman's statutory right to compensation based on strict liability); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943) (federally legislated right of certain workers to choose a collective bargaining representative); *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929) (right, created by statute, to invoke investigative action by the Tariff Commission); *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (statutory penalties for violations of the Occupational Safety and Health Act); *Block v. Hirsh*, 256 U.S. 135 (1921) (tenant's right, created by Congress in emergency legislation, to retain possession of premises after expiration of a lease). *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855), cited by the Claims Court, involved the statutory power of the Treasury to issue a warrant for sale of property to cover a discrepancy in the accounts of a federal tax collector.

> strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. . . . *Granfinanciera, S.A. v. Nordberg*, *supra*, 492 U.S. at ___, 109 S. Ct. at 2795.

Cases involving "public rights" within the meaning of that discussion are cases

> . . . involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity. . . . *Id.*, 492 U.S. at ___, 109 S. Ct. at 2797 n.10.

The majority's discussion of the doctrine in *Granfinanciera* assumes that a "suit at common law" involves "public rights" and may be assigned to a specialized tribunal without provision for a jury trial only if the right involved is one created by Congress. This Court has applied the doctrine only in cases involving Congressionally-created rights and obligations. See note 13, *supra*, pp. 24-25.

If "public rights" depend for their existence on an Act of Congress, the doctrine cannot apply here. The government's contract rights have always been enforceable under the common law:

> . . . Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. . . . *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850).

And see note 11, *supra*, pp. 19-20. Moreover, the government's right to recover contract damages from a private party cannot be "conclusively determined" by the legislative or executive branch as described in *Thomas*, *supra*. In the absence of a contractual agreement to the contrary the government's enforcement of such claims has always been accomplished through the Article III courts.

V. The Decision Below Holds that Execution of the Standard Government Contract Operates as an Unintended Consent to Subsequent Action Which Takes Away Constitutional Rights.

The Court of Appeals reasoned that because petitioners had agreed in their contracts to resolve disputes pursuant to the CDA, and because they could not reasonably expect that Congress would never amend the CDA, they could be "held to the CDA procedures in effect at the time the dispute arises" (App-14). In support of its waiver analysis the Court of Appeals cited decisions of this Court which have no application here.

The cases cited by the Court of Appeals address the extent to which changes in the law can be given retroactive effect without the *fact of the change itself* violating concepts of fundamental fairness and the constitutional guarantee of due process.[14] They do not hold that once a party has agreed to specific statutory procedures that party has waived the right to challenge subsequent changes in the law which take away *independently-protected* constitutional rights. These petitioners have not argued that the Due Process Clause prohibits changes in the CDA. They have asserted their right to defend against the government's contract claims in a court which exercises the judicial power of the United States in accordance with Article III. Their agreement to CDA procedures which expressly *included* that right could not possibly have been a *waiver* of that same right.

The Court of Appeals has misread and misapplied decisions of this Court to find a waiver of an important constitutional right when no such waiver could have been intended.

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[14] *Pension Benefit Guarantee Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729-30 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976); *California v. Southland Royalty Co.*, 436 U.S. 519, 528-29 (1978); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 306-11 (1935); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482 (1911).

These cases were decided on motions to dismiss the government's counterclaims. Waiver had not been pleaded and no evidence had been produced. The court's holding ignores the requirement that waiver be affirmatively pleaded. F.R.C.P. 8(c). It ignores the presumption against waiver of important constitutional rights, *Glasser v. United States*, 315 U.S. 60 (1942); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). It also ignores the principle that waiver depends on actual intent and upon the facts of each case. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

Moreover, the Court of Appeals has found that unintended waiver, which it held applicable as a matter of law, in the language of a disputes resolution clause which is routinely included in the federal government's contracts. As a result of this decision, parties who contract with the federal government will be held to have agreed in advance to future amendments to the CDA even if those amendments ignore or violate rights which are guaranteed by the United States Constitution. This rule, imposing as a matter of law a blanket advance waiver of unanticipated deprivations of constitutional rights, must be corrected by this Court.

CONCLUSION

The decisions below misread and refuse to follow decisions of this Court affecting important constitutional rights. They announce new and incorrect rules of law with broad potential application in litigation involving

government contracts. This Court should issue its writ of certiorari and should itself address and decide the important issues presented by the decisions below.

Respectfully submitted,
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APPENDICES

APPENDIX A

United States
COURT OF APPEALS
for the Federal Circuit

88-1486

SEABOARD LUMBER COMPANY, W. T. BURGESS LOGGING CO., INC., BIG FLAT TIMBER COMPANY, MANKE LUMBER COMPANY, MERRILL & RING, INC., TOMCO, INC., ALPINE VENEERS, INC., PENN TIMBER, INC., TIMES MIRROR LAND & TIMBER COMPANY, TAYLOR WESTBROOK, BRAZIER FOREST PRODUCTS, INC., GATEWAY LUMBER COMPANY, MT. ADAMS VENEER CO. AND CAPITAL DEVELOPMENT COMPANY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: May 17, 1990

Before NIES, *Circuit Judge*, BALDWIN, *Senior Circuit Judge*, and BISSELL,* *Circuit Judge*.

NIES, *Circuit Judge*.

This appeal is from a certified interlocutory order of the United States Claims Court denying appellants'

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* Judge Bissell, who died on February 4, 1990, did not participate in the decision in this case.

motion to dismiss the government's counterclaims for breach by the contractors of particular government contracts. Our jurisdiction rests on 28 U.S.C. § 1292(d)(2) (1988). Appellants urged dismissal of the government's counterclaims on the grounds that the appellants have a right to defend against the government's claims in an Article III court. Appellants also assert a right to a jury trial. The Claims Court rejected these constitutional arguments. *See Seaboard Lumber Co.* v. *United States,* 15 Cl. Ct. 366 (1988) (Smith, C.J.). We affirm on narrower grounds.

BACKGROUND

Appellants are timber companies that individually contracted with the United States to purchase timber from National Forests. With respect to each contract, the government asserted its breach claim against the contractor by means of an appropriate contracting officer's decision. In each case, the contracting officer issued a decision that the contractor failed to cut, remove and pay for timber as required by the contract and assessed a specific dollar amount of damages in each instance. *See* 41 U.S.C. § 605(a) (1982).

Each timber purchasing contract, as originally executed or later amended,[1] contained a standard disputes clause which provides in pertinent part:

> C9.2 (disputes).
>
> (a) This contract is subject to the Contract Disputes Act of 1978 (Pub. L. 95-563).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this provision.
>
> . . . .
>
> (c) iii . . . . A claim by the government against the contractor shall be subject to a decision by the contracting officer.
>
> . . . .
>
> (f) The contracting officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

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[1] All of the contracts here were executed after March 1, 1979, the effective date of the Contract Disputes Act (CDA). Apparently, one of the contracts was awarded prior to the effective date of the CDA, see *Mount Adams Veneer Co.* v. *United States*, Cl. Ct. No. 800-87C, but this contract was subsequently amended and before the Claims Court this contractor presented no argument that a pre-CDA contract has any effect different from post-CDA contracts for the purposes of the issues in this appeal. Consequently, it is treated as a post-CDA contract containing the dispute resolution clause in this appeal.

By the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1982 & Supp. V 1987), Congress mandated that these provisions be included in government contracts generally. *See* 41 U.S.C. § 602 (1982).

Under the above clause, once the decision of the contracting officer becomes final on a government claim against the contractor, the merits of that decision cannot be judicially challenged. To prevent that preclusive effect, the contractor has two options under the contract provisions which incorporate the CDA. The contractor may either appeal within 90 days to the appropriate Board of Contract Appeals as provided in 41 U.S.C. § 606 (1982) or within twelve months file a direct access suit in the United States Claims Court, an Article I court, under 41 U.S.C. § 609(a)(3) (1982). In these proceedings, the facts, as well as the law, are decided *de novo* by the board or the court. *See id.*; 41 U.S.C. § 605(a); *Assurance Co.* v. *United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987). At the time the CDA became effective, and at the time all but four of the contracts at issue were executed, a direct access suit would have been filed in the United States Court of Claims, an Article III court.[2] That was changed, effective October 1, 1982, by the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164,

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[2] *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 531-32 (1962); Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U.S.C. § 171 (1988).

96 Stat. 25, which placed jurisdiction over direct access suits in a new Article I court, the United States Claims Court. FCIA also provided that an appeal from either the appropriate Board of Contract Appeals or from the United States Claims Court may only be taken to the United States Court of Appeals for the Federal Circuit, an Article III court. The jurisdiction over such appeals is exclusive. 28 U.S.C. §§ 1295(a)(3), (10) (1988).

Each appellant filed suit in the Claims Court seeking review of the contracting officer's decision in favor of the government as provided in 41 U.S.C. § 609(a).[3] Had they failed to seek review, the contracting officer's decisions under the contracts (and CDA) would have become final and could not thereafter be judicially challenged on the merits.[4] In each suit, the government

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[3] The CDA provides that a contractor can appeal "any claim" to the Claims Court. The United States, however, cannot appeal to the Claims Court. Thus, Claims Court jurisdiction is invoked solely by the contractor availing itself of this option.

[4] The government may obtain a judgment on the basis of such decision in a state or federal court without litigating the merits. *United States* v. *Ulvedal*, 372 F.2d 31, 34-35 (8th Cir. 1967); *United States* v. *Hammer Contracting Corp.*, 331 F.2d 173, 175-76 (8th Cir. 1964); *United States* v. *Hamden Co-operative Creamery Co.*, 297 F.2d 130 (2d Cir. 1961); *United States* v. *Smith*, 152 F. Supp. 322 (E.D. Pa. 1957).

By the same token, a contractor is not required to litigate its claim against the government, but rather may rely on the finality of a contracting officer's decision absent a government appeal. *See S&E Contractor's, Inc.* v. *United States*, 406 U.S. 1 (1972).

filed a counterclaim asserting the breach of contract claim which was the subject of the contracting officer's decision. Thus, the government's breach of contract claim underlies both the complaint and the counterclaim. Each appellant then filed a motion to dismiss the government's counterclaim urging that adjudication of the counterclaim must occur in an Article III court and that, under the Seventh Amendment, the contractor was entitled to a jury trial.[5]

Appellant's suits were consolidated in the Claims Court for consideration of the constitutional issues. In denying the appellants' motion to dismiss the government's counterclaims, the Claims Court held that: (1) a government contract claim was not an action at common law and therefore did not require resolution by an Article III court, *Seaboard,* 15 Cl. Ct. at 369-72; (2) such claim fell within the "public rights" exception to Article III and Congress could thus constitutionally provide for adjudication by a non-Article III tribunal, *id.* at 372-74; and (3) the Seventh Amendment did not entitle the contractors to a jury trial of the government's claims, *id.* at 374-75. The Claims Court dealt summarily

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Under the CDA, while the government may not appeal to the Claims Court, *see supra* note 3, it may appeal to the appropriate board of contract appeals. 41 U.S.C. § 606.

[5] Appellants did not move for dismissal of their suits and apparently intend to proceed to challenge the validity of the contracting officer's decision in accordance with the CDA if unsuccessful in this appeal.

with the government's alternative defense that the contractors had waived the asserted rights, if any existed. Recognizing that controlling questions of law were at issue, the questions of appellants' right to trial in an Article III court and right to jury trial, the Claims Court certified the interlocutory order for immediate appeal pursuant to 28 U.S.C. § 1292(d)(2). This court granted appellants permission to appeal.

ISSUE

Whether the CDA, as originally enacted or as amended by FCIA, unconstitutionally deprives appellants of either a right to an Article III court or a jury trial on the government counterclaims for breach of contract?

OPINION

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Seaboard and all other contractors (hereinafter Seaboard) assert that the government's breach of contract claim should be deemed comparable to a private contract claim which, historically must be litigated in an Article III court with a right to a jury. In support of this analogy, it asserts that prior to the CDA, the government had to litigate a breach claim against a

contractor in an Article III court (although it cites no authority for this proposition). It maintains further that waiver of sovereign immunity and the authority of an Article I court to adjudicate claims *against* the government are not involved here. These premises lead Seaboard to its ultimate conclusion that the CDA's review procedures are unconstitutional. We disagree. The premises of Seaboard's syllogism are fatally flawed in a number of respects.

I

Seaboard correctly states that the Seventh Amendment preserves a right to a jury trial on issues of fact in suits for breach of contract damages between private party litigants, *see Northern Pipeline Constr. Co.* v. *Marathon Pipe Line,* 458 U.S. 50 (1982), but Seaboard fails to carry its analogy through to its logical conclusion. The Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases. Waiver can be either express or implied. *Commodity Futures Trade Comm.* v. *Schor,* 478 U.S. 833, 848 (1986); *cf. D.H. Overmyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972) (contractual waiver of due process rights). Waiver requires only that the party waiving such right do so "voluntarily" and "knowingly" based on the facts of the case. *Brookhart* v. *Janis,* 384 U.S. 1, 4, 5 (1966); *cf. D.H. Overmyer,* 405 U.S. at 185-86. The acceptance of contract provisions providing for dispute resolution in a forum where there is no entitlement to a jury trial may satisfy

the "voluntary" and "knowing" standard. *See, e.g., Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l,* 373 F.2d 136; 142 (8th Cir.) *cert. denied,* 389 U.S. 827 (1967); *Maryland Casualty Co.* v. *United States,* 135 Ct. Cl. 428, 438 (Ct. Cl. 1956) (Jones, C.J., concurring).

Contrary to Seaboard's view, Congress has not taken away the contractor's right to have the government establish its breach claim in an Article III court before a jury. By contractual agreement, the government had regularly provided (until curbed by Congress) that the decision of a contracting officer was final and not subject to review in *any judicial* forum. *United States* v. *Moorman,* 338 U.S. 457 (1950) (and cases cited therein). Moreover, these contractual provisions denying judicial review were specifically upheld by the Supreme Court, except for fraud on the government's part. *Wunderlich* v. *United States,* 342 U.S. 98, 99 (1951); *United States* v. *Holpuch Co.,* 328 U.S. 234 (1945) (contractor's failure to appeal per dispute resolution process in contract precluded suit in Court of Claims); *United States* v. *Blair,* 321 U.S. 730 (1944) (same effect). Government contractors long have been held to be bound by a provision vesting dispute resolution in a nonjury/non-Article III forum. *United States* v. *Moorman,* 338 U.S. at 460-62. In *Wunderlich,* the Supreme Court upheld the enforceability of the "finality clause" of a standard form government contract which provided that disputes between the parties "shall be decided by the contracting officer with a right of appeal

to the head of the department 'whose decision shall be final and conclusive upon the parties thereto.'" As stated in *Wunderlich,* 342 U.S. at 99-100:

> The same Article 15[6] of a government contract was before this Court recently, and we held, after a review of the authorities, that such Article was valid. *United States* v. *Moorman,* 338 U.S. 457 [(1950)]. Nor was the *Moorman* case one of first impression. Contracts, both governmental and private, have been before this Court in several cases in which provisions equivalent to Article 15 have been approved and enforced "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment . . . ." *Kihlberg* v. *United States,* 97 U.S. 398, 402 [(1878)]; *Sweeney* v. *United States,* 109 U.S. 618, 620 [(1883)]; *Martinsburg & P.R. Co.* v. *March,* 114 U.S. 549, 553 [(1885)]; *Chicago*

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[6] The dispute clause under review in *Wunderlich* provided, in full:

> ARTICLE 15. *Disputes*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Wunderlich, 342 U.S. at 99.

> *S.F. & C.R. Co.* v. *Price,* 138 U.S. 185, 195 [(1891)].

Thus, voluntary waiver of both Article III and Seventh Amendment rights, as a matter of both private or government contract law, suffers from no inherent constitutional or legal infirmity. Contrary to Seaboard's premise, by the permissible terms in its contracts, the government did not have to litigate the merits of such claim against a contractor, either as to entitlement or amount, in an Article III court before a jury.[7]

Seaboard argues that any waiver was not "voluntary" because government contracts are inherently adhesion contracts, and cites to precedent invalidating contractual provisions where the provision for a waiver resulted from the unfair bargaining positions between the parties.[8] The bare fact that the contracts in question are "take it or leave it" offers by the government is not controlling on the dispute resolution provision's validity, as we read the precedent. The Supreme Court in *Wunderlich,* 342 U.S. at 100, addressed the nature of the government-contractor relationship:

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[7] While the government had to obtain a judgment on its claim in state or federal court, the merits of a final contracting officer's decision could not be litigated in that *pro forma* proceeding. *See supra* note 4.

[8] *See Leasing Serv. Corp.* v. *Crane,* 804 F.2d 828, 833 (4th Cir. 1986); *National Equip. Rental Ltd.* v. *Hendrix,* 565 F.2d 255, 258 (2d Cir. 1977); *see also, Dreiling* v. *Peugeot Motors of America,* 539 F. Supp. 402 (D. Colo. 1982).

> Respondents were not compelled or coerced into making the contract [with the government]. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner. This, we have said in *Moorman,* Congress has left them free to do. *United States* v. *Moorman, supra,* at 462. The limitation upon this arbitral process is fraud, placed there by this Court.

With respect to the voluntariness of agreeing to the dispute resolution provision in this contract, *Wunderlich* is controlling.

After the *Wunderlich* decision, Congress, as a matter of grace, provided for narrow judicial review of a contracting officer's decision, limiting by statute (the Wunderlich Act) the contractual options previously available to the government. *See* 41 U.S.C. §§ 321, 322 (1982); *S&E Contractors, Inc.* v. *United States,* 406 U.S. 1, 13-15 (1972). However, absent a contractor's invoking the allowed procedures, a contracting officer's decision became the final adjudication of the government's claim by reason of the disputes clause in the contract. *Crown Coat Front Co.* v. *United States,* 386 U.S. 503, 512-14 (1967).

The CDA, which followed the Wunderlich Act, further restricted the government's options on dispute resolution. Congress mandated that the government had to include in its contracts the broader review provisions set out in the CDA, that is, the dual avenues of review

either by appeal to a Board of Contract Appeals or by a direct access suit in the Court of Claims. However, Congress confirmed the use of a finality clause in the contract with respect to a contracting officer's decision in favor of the government, absent the contractor's resort to these review procedures. *See* 41 U.S.C. § 605. Otherwise, the government is not required to litigate the merits of its breach claim.

As in *Moorman* and *Wunderlich,* Seaboard agreed to the contract provisions spelling out the specific procedures for dispute resolution, none of which entail a jury trial in an Article III court. The effect of such agreement is that at least Seaboard *prima facie* voluntarily and knowingly waived any right to dispute resolution except in accordance with the contract.[9]

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[9] Appellants do not argue that they did not know they would not have a jury trial either in the Claims Court or Court of Claims. They urge, however, that nothing prohibited either court from adopting rules providing for jury trials, presumably pursuant to 28 U.S.C. § 2503 (1988), and that the Constitution does not prohibit jury trials in Article I courts. We reject these arguments as grounds for reversal. A mere expectation of future rulemaking alone cannot defeat the known effect of proceeding under the CDA dispute resolution process any more than an argument that appellants expected the Congress to pass a statute negating the possibility that jury trials can be waived altogether. This is particularly the case where the government is a party to the suit since traditionally, Congress has almost always conditioned waivers of sovereign immunity on adjudication without a jury. *Lehman* v. *Nakshian,* 453 U.S. 156, 161 (1981).

Finally, Seaboard asserts that the contractors who entered contracts prior to the FCIA cannot be held to have waived trial level adjudication by Article III judges. As indicated, FCIA amended the CDA so that direct access suits could no longer be brought in the Article III Court of Claims but would be brought in the Article I Claims Court with appeal to this Article III court. However, under the prior procedure, a trial commissioner was statutorily authorized to conduct the trial and to file a report of factual findings. *See* 28 U.S.C. § 2503 (1976). The Article III judges of the Court of Claims reviewed reported findings for error under a "presumption of correctness" standard. *See Montgomery Coca-Cola Bottling Co.* v. *United States,* 615 F.2d 1318, 1322-23 (Ct. Cl. 1980). Thus, the split of trial and review functions under both systems is substantially similar. Moreover, the disputes clause of the subject contracts referenced the CDA, not specific procedures. In such circumstances, where a contract incorporates procedures under a statute, an expectation that the statute will remain unchanged would not be reasonable. Congress, having enacted the CDA procedures, clearly had the power to change them. By referencing the CDA procedures generally, the parties can be held to the CDA procedures in effect at the time the dispute arises. *See Pension Benefit Guarantee Corp.* v. *R. A. Gray & Co.,* 467 U.S. 717, 729-30 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16 (1976)); *California* v. *Southland Realty Co.,* 436 U.S. 519, 528-29 (1977); *Norman* v. *Baltimore &*

Ohio R.R., 294 U.S. 240, 306-11 (1935); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 482 (1911); *Opdyke Inv. Co.* v. *City of Detroit*, 883 F.2d 1265, 1275 (6th Cir. 1989); *Fisch* v. *General Motors Corp.*, 169 F.2d 266, 270-71 (6th Cir. 1948). In view of these circumstances, we conclude that Seaboard has demonstrated no change so material or drastic with respect to fact-finding by Article III judges that the revised system cannot be deemed reasonably within the scope of the subject waiver.

II

Another fallacy of Seaboard's position is that its challenge to the government's claim before the Claims Court does not implicate sovereign immunity, and therefore Congress' power to place litigation involving the sovereign in an Article I court cannot be relied on in these cases. Since the venerable case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855), it has been established that the authorization by Congress of a suit to challenge a government claim against the plaintiff can be brought only because of the consent of the sovereign. In *Murray's Lessee*, Congress enacted a statute which permitted the Treasury Department to audit and assess customs officials' accounts, to issue a warrant of indebtedness for any delinquency, and to levy against that delinquency. Thereafter the customs collector was allowed to contest the determination of indebtedness in district court. In upholding the constitutionality of these

procedures, the Supreme Court expressly noted that they implicated sovereign immunity, stating:

> When . . . after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; . . . . The United States consents that this fact of indebtedness may be drawn in question by a suit against them.

Murray's Lessee, 59 U.S. (18 How.) at 284. Similarly, the complaints in this appeal are pursuant to a structural system set up by the CDA, which is dependent on waiver of sovereign immunity. Indeed, the CDA review procedures attacked here provide a more expansive waiver than the prior procedures provided in the Wunderlich Act. It is not disputed that the government may condition its consent to suit upon a plaintiff suing only in an Article I court, on waiving a jury trial, or on other conditions including provision for counterclaims to be asserted by the government. *See United States* v. *Mitchell*, 463 U.S. 206 (1983) (Tucker Act, 28 U.S.C. § 1491, constitutes waiver of sovereign immunity, conditioned on conferring jurisdiction in Claims Court, an Article I tribunal); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (Age Discrimination in Employment Act, 29 U.S.C. § 633a, constitutes waiver of sovereign immunity conditioned on relinquishing right to jury trial); *Library*

of Congress v. *Shaw*, 478 U.S. 310 (1986) (Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k), waives sovereign immunity conditioned on no recovery of interest); *Kosak* v. *United States*, 465 U.S. 848 (1984) (Federal Tort Claims Act, 28 U.S.C. §§ 2680(a)-(f), (h)-(n), conditions waiver of sovereign immunity on thirteen exceptions; § 2680(c) precludes suit alleging that customs officials injured property that had been detained by the Customs Service).

It has also long been the law that an Article I court without a jury may adjudicate fact issues related to a counterclaim by the government against the plaintiff. In *McElrath* v. *United States*, 102 U.S. 426, 440 (1880), the Supreme Court held that counterclaims by the government in a suit brought in the Court of Claims (then deemed to be an Article I court) is not controlled by the Seventh Amendment due to conditions placed on the waiver of sovereign immunity:

> The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that *if he avails himself of the privilege of suing the government in* the special court organized for that purpose, he may be met with a set-off, *counter-claim*, or

> other demand of the government, upon which judgment may go against him, *without the intervention of a jury*, if the court, upon the whole case, is of [the] opinion that the government is entitled to such judgment. *If the claimant avails himself of the privilege thus granted [to sue the sovereign]*, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject. [Emphasis added.]

Seaboard has invoked the privilege of suing the government by filing its complaint in the Claims Court for review of the contracting officer's decision. Absent the waiver of sovereign immunity provided by the CDA, Seaboard could not have filed that complaint. Having invoked that privilege, Seaboard is subject to the conditions of such waiver, one of which is that it subjects itself to the possibility of a government counterclaim to be tried in a non-jury/Article I tribunal, conditions which Congress may impose. The Supreme Court has spoken unequivocally on this point in *McElrath*.

Appellants rely on *Tull* v. *United States*, 481 U.S. 412 (1987), in support of a result contrary to *McElrath*. In *Tull*, the United States sued a violator of the Clean Air Act, 62 Stat. 1155, as amended 33 U.S.C. § 1251 *et seq.*, under a specific provision of that act which authorized suit in federal district court for the recovery

of, *inter alia*, civil penalties. 481 U.S. at 414-15. Tull demanded a jury trial which was denied by the trial court and the denial was upheld in the court of appeals. *Id.* at 415-16. The Supreme Court reversed, holding that on the factual issue of Tull's liability, a jury trial was required under the Constitution because the remedy sought by the government was for money damages.[10] *Id.* at 427. *Tull* is clearly distinguishable in that the parties in *Tull* had no contractual agreement to resolve factual issues in accordance with non-Article III procedures. Moreover, the government had no alternative but to sue the defendant in district court to establish the defendant's liability.[11] Congress' authority to condition a statutory right to review based on limited waiver of sovereign immunity was not implicated.

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[10] However, the Supreme Court interpreted the statute as not giving Tull a right to a jury determination on the issue of the amount of damage and directed that the amount be fixed by the judge. *Tull*, 481 U.S. at 427.

[11] That Congress placed adjudication of liability in the first instance in federal district court also led to a right to jury trial in two other recent Supreme Court decisions. *Granfinanciera* v. *Nordberg*, 492 U.S. ___, 109 S. Ct. 2782 (1989); *Teamsters Local 391* v. *Terry*, ___ U.S. ___, 58 U.S.L.W. 4345, 1990 U.S. LEXIS 1530 (March 20, 1990). Indeed, in *Terry*, the Court expressly recognized that whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court involved considerations outside the traditional Seventh Amendment analysis applied in *Tull*. *See Terry*, n.4.

In sum, it is only as a matter of legislative grace that Seaboard has access to any Article I or III forum. Before Congress' restriction of the government's contract options, the government, by contract provisions, could and did avoid litigation of the merits of its contract claims in any tribunal. Thus, the basis for Seaboard's suit in the Claims Court is a statutory right, which involves a waiver of sovereign immunity. That review is *de novo*, rather than limited, is also a matter of legislative grace. Seaboard is not, as it would have it, merely facilitating the government's obligation to litigate a contract claim for a determination of the government's rights. Seaboard is asserting its own right, a right to review that is given to Seaboard by the contract provisions incorporating the CDA which waives sovereign immunity to that extent.

Conclusion

In conclusion, we agree with the government that under the lawful terms of the contract, Seaboard has agreed to only limited rights of review of the government's counterclaim. Under these circumstances, assuming it has the rights it asserts in the absence of its contract, Seaboard has waived any right to have the government counterclaim litigated in an Article III court before a jury. Moreover, the CDA's non-Article III/non-jury review procedures, enacted to restrict the government's dispute resolution options, are, under controlling precedent, constitutionally permissible as a

condition on the waiver of sovereign immunity. The order of the Claims Court denying Seaboard's motion to dismiss is

AFFIRMED.

APPENDIX B

United States Court of Appeals

for the Federal Circuit

88-1486

SEABOARD LUMBER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

Before NIES, Chief Judge, BISSELL, Circuit Judge, and BALDWIN, Senior Circuit Judge.

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on September 18, 1990.

FOR THE COURT,

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

Dated: September 11, 1990

cc: WILLIAM F. LENIHAN
PAUL L. LANGER
WESLEY R. HIGBIE
RICHARD A. SMITH
JAN D. SOKOL

SEABOARD LUMBER V US, 88-1486
(CLM - 610-84 C)

United States Court of Appeals
for the Federal Circuit

88-1486

SEABOARD LUMBER COMPANY, W. T. BURGESS LOGGING CO., INC., BIG FLAT TIMBER COMPANY, MANKE LUMBER COMPANY, MERRILL & RING, INC., TOMCO, INC., ALPINE VENEERS, INC., PENN TIMBER, INC., TIMES MIRROR LAND & TIMBER COMPANY, TAYLOR WESTBROOK, BRAZIER FOREST PRODUCTS, INC., GATEWAY LUMBER COMPANY, MT. ADAMS VENEER CO. AND CAPITAL DEVELOPMENT COMPANY,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES CLAIMS COURT

in CASE NO(S). 610-84C, 632-84C, 677-84C, etc.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED May 17, 1990 /s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

COSTS: Against, Appellant.

PRINTING----------$353.20

TOTAL----------$353.20

ISSUED AS A MANDATE: October 4, 1990

United States Court of Appeals
for the Federal Circuit

88-1486

SEABOARD LUMBER,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

Dated: October 31, 1990

cc: WILLIAM F. LENIHAN
PAUL L. LANGER
WESLEY R. HIGBIE
RICHARD A. SMITH

SEABOARD LUMBER V US, 88-1486
(CLM 610-84 C)

APPENDIX C

In the United States Claims Court

Nos. 610-84C, 832-84C, 677-84C, 33-85C, 85-85C, 95-85C, 423-85C, 664-85C, 37-86C, 38-86C, 135-86C, 364-86C, 442-86C, 553-86C, 780-86C, 64-87C, 363-87C, 285-87C, 435-87C, 561-87C, 589-87C, 681-87C, 750-87C, 800-87C, 28-88C, 54-88C, 68-88C, 69-88C, 70-88C, 71-88C

(Filed: May 3, 1988)

Schwabe, Williamson, Wyatt & Lenihan

SEABOARD LUMBER COMPANY, et al., *Plaintiffs,* v. THE UNITED STATES, *Defendant.*	Jurisdiction; constitutionality of the CDA; no right to jury trial in the Claims Court or under the CDA; public rights; federal contract law; jurisdiction to decide constitutionality of Acts of Congress.

OPINION

SMITH, Chief Judge

These consolidated cases, through plaintiffs' motion to dismiss defendant's counterclaims, call into question the constitutionality of the Contract Disputes Act of 1978 (CDA)[1] as amended by the Federal Courts Improvement Act of 1982 (FCIA).[2] The main issue presented in plaintiffs' motion to dismiss is whether the Claims Court, an Article I tribunal, has jurisdiction to determine the defendant's counterclaims[3] which, according to plaintiffs, are common law breach of contract claims properly lodged only in an Article III tribunal. The plaintiffs' second and related issue is whether the

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[1] 41 U.S.C. §§ 601-13 (1982).

[2] The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, replaced the Article III Court of Claims with the Article I Claims Court. The Court of Claims appellate Judges along with the Judges of the Court of Customs and Patent Appeals became the United States Court of Appeals for the Federal Circuit.

[3] In *Alpine Veneers, Inc. v. United States*, Cl. Ct. No. 664-85C, the contracting officer has satisfied the damage claims by offset, thus, there is no jurisdictional dispute as plaintiffs are suing the United States under 28 U.S.C. § 1491 (1982) for a refund of money. *See Ingalls Shipbuilding v. United States*, 13 Cl. Ct. 757 (1987). In *Mt. Adams Veneer Co. v. United States*, Cl. Ct. No. 800-87C, the contract was awarded prior to the effective date of the CDA. In light of the court's holding that these cases do not require exclusive jurisdiction in the Article III judiciary, there is no merit to the argument that pre-CDA cases must be heard in the United States District Courts pursuant to 28 U.S.C. § 1345 (1982).

Seventh Amendment to the Constitution requires a jury trial of the defendant's counterclaims. For the reasons stated below, we hold that the Claims Court has jurisdiction over the counterclaims and that the Seventh Amendment does not require that such counterclaims be tried before a jury.

FACTS

The facts are not complicated. The underlying contracts are timber sales contracts between various contractors and the United States Forest Service. Under each of the contracts in question, the plaintiffs were required to remove a certain amount of timber by a certain date. According to the government, the plaintiffs have each failed to meet the requirements of their respective contracts. Thus, the government has determined them to be in default and has sought to recover damages from the plaintiffs through a contracting officer's final decision adverse to them.

The majority of the contracts in question were executed after the March 1, 1979, effective date of the CDA, but before the October 1, 1982, effective date of the FCIA.[4] The contracts each include a disputes clause

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[4] The contracts in *Alpine Veneers v. United States*, Cl. Ct. No. 681-87C; *Alpine Veneers v. United States*, Cl. Ct. No. 561-87C; *Brazier Forest v. United States*, Cl. Ct. No. 363-87C; and *Taylor Westbrook v. United States*, Cl. Ct. No. 422-86C were all executed after October 1, 1982. Therefore, even if these cases required an exercise of the Article III judicial power, the plaintiffs

which in substance mirrors the requirements of the CDA. The disputes clause provides in part:

> C9.2 (disputes).
>
> (a) This contract is subject to the Contract Disputes Act of 1978 (Pub. L. 95-563).
>
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this provision.
>
> . . . .
>
> (c)iii . . . . A claim by the government against the contractor shall be subject to a decision by the contracting officer.
>
> . . . .
>
> (f) The contracting officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

The CDA, incorporated into the contract by the disputes clause, currently provides that a contractor has two options when appealing a final decision of the contracting officer. The contractor may appeal within 90 days to the proper Board of Contract Appeals, 41 U.S.C. § 606 (1982), or within 12 months may file a direct access appeal in the United States Claims Court, 41 U.S.C. § 609(a)(3) (1982). However, at the time

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in those cases could be deemed to have waived any rights to Article III adjudication upon entering into the contracts in question.

most of these contracts were entered into, the contractor had the option of a direct access appeal to the Article III Court of Claims rather than the Article I Claims Court.[5]

Plaintiffs have complied with the requirements of the CDA and are now appealing for trial *de novo* the contracting officer's decision that they are in breach of contract. In this court the United States pursues its breach of contract claims through counterclaims against the various plaintiffs.

Discussion

A. *Does the Claims Court have the power to review the constitutionality of a statute granting jurisdiction?*

A preliminary question raised by the plaintiffs in their reply brief is whether this court has the power to determine that the CDA, as amended by the FCIA, is unconstitutional as applied to the plaintiffs in this case. For support for the proposition that the court cannot question the constitutionality of statutes granting the court jurisdiction, plaintiffs cite *Johnson v. Robison*, 415 U.S. 361 (1974), and cases cited in that opinion. While, as *Johnson* noted, an administrative agency generally does not have the jurisdiction to make decisions

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[5] Prior to the October 1, 1982, effective date of the FCIA, the CDA provided for direct access appeal to the Court of Claims. After October 1, 1982, the Court of Claims docket was transferred to the Claims Court and any further direct access appeals were filed in the Claims Court.

regarding the constitutionality of a statute, it is also true that this court cannot be construed to be an administrative agency. On this point the Court of Claims stated, after recognizing that the Supreme Court in *Williams v. United States*, 289 U.S. 553 (1933) had a few years earlier ruled it to be a legislative court:

> [T]his court is a court, in fact as well as in name, and . . . its decisions are judicial decisions. If it were not, the Supreme Court would not review its decisions, as it does, . . . And we would suppose, unless the decision in the *Williams* case means to the contrary, that we are no more acting as a mere agent or arm of the legislature, when we decide our cases in the first instance, than is the Supreme Court, when it, under the appellate procedure prescribed in the statute decides them finally. Each court is assigned its place in the process of doing justice between the United States and those who have claims against it. That is the major portion of this court's assignment. It is only a small part of the Supreme Court's assignment. But one, when it is performing that assignment must be acting judicially, if the other is.

Pope v. United States, 100 Ct. Cl. 375, 383, *rev'd on other grounds*,[6] 323 U.S. 1 (1944) (footnotes omitted).

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[6] In *Pope* the Court of Claims held that a Special Act of Congress creating liability, but directing the court to calculate damages, was unconstitutional because it encroached upon the

Therefore, cases such as *Johnson* do not apply to an Article I court. Furthermore, this court has always exercised the power to determine its jurisdiction even when that consideration involved the constitutionality of a statute. *United States v. La Abra Silver Mine*, 29 Ct. Cl. 432 (1894) (opinion overruling defendant's demurrer on the question of jurisdiction) 32 Ct. Cl. 462 (1897) (the court's decision on the merits), *aff'd*, 175 U.S. 423 (1899). *Ingalls Shipbuilding v. United States*, 13 Cl. Ct. 757 (1987). Additionally, as noted in *Ingalls* "the Claims Court Judges take the same oath to exercise their duties consistently with the Constitution, which Chief Justice Marshall referred to in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803)." *Ingalls*, 13 Cl. Ct. at 761. Thus, in order to comply with the oath, the court must fail to give effect to unconstitutional statutes and adjudicate only on those which it finds to be constitutional.

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judicial power of the court. The Supreme Court reversed, noting that the Court of Claims performed legislative, administrative, and judicial functions, but that the mathematical calculations involved required an exercise of judicial power and, therefore, the Court of Claims should have decided the case and the Supreme Court could review it.

B. *Do these cases require an exercise of the Article III judicial power of the United States?*

1. *Federal contract law actions are not suits at common law.*

These cases present yet another chapter in the continuing saga of Justice Marshall's distinction between "legislative" and "constitutional" courts. *See American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The basic issue involved is whether the government's breach of contract claims, brought as counterclaims pursuant to the CDA, are of such a nature as to require adjudication solely in a "constitutional" court established with full Article III protections of life tenure and irreducible salary. Deciding whether a claim is of that nature is not an easy task. However, there are certain cases which clearly fit within the sole jurisdiction of Article III. These cases are those traditional common law cases arising under state law and between private parties. *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 587 (1985); *Northern Pipeline Co. v. Marathon Pipeline*, 458 U.S. 50, 90 (1982) (Rehnquist J. concurring); *but see Commodity Futures Trading Comm. v. Schor*, 106 S. Ct. 3245 (1986) (The claims in *Commodity Futures* were state law claims, but there had been a waiver of any personal rights to Article III adjudication, and the statutory scheme did not violate the separation of powers doctrine). On the other hand, those cases which arise pursuant to rights created by federal statute or the federal Constitution may be susceptible to

both Article III and Article I adjudication. *Thomas*, 473 U.S. at 584-85; *Northern Pipeline*, 458 U.S. at 80-81.

The claims in this case fall somewhere in the area between these two relatively bright lines. They do not present questions of state law within the understood holding of *Northern Pipeline* that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law . . . ." *Thomas*, 473 U.S. at 584. Nor do they fall within those cases where Congress or the Constitution directly has created the applicable federal law from which the claims arise.

It is undisputed that the law to be applied in cases related to federal contracts is federal and not state law. *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *Forman v. United States*, 767 F.2d 875, 879-80 (Fed. Cir. 1985). The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private

contract law for analogies and concepts. However, it is a separate and distinct body of law.

The court is of the opinion that disputes governed by this body of federal contract law do not constitutionally require an Article III tribunal. This is so because of the nature of the sovereign-contractor relationship. This relationship flows from the Constitution[7] and is at the core of the most basic attribute of government: the ability to spend money and incur obligations. As noted in the Federalist 15:

> The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. Though this principle does not run through all the

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[7] U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ."); U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"); U.S. Const. art. I, § 8, cl. 18 ("Congress shall have the power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."). *See also United States v. Allegheny Co.*, 322 U.S. 174, 182 (1944); *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

> powers delegated to the Union, yet it pervades and governs those on which the efficacy depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individual citizens of America.[8]

When the sovereign enters into a contract, it does so as the sovereign, even though it has some attributes of a private contractual party. The federal sovereign is the guardian of certain national interests and values set forth in the Constitution. It must at all times act in this capacity, whether as contracting party, military force or keeper of the fisc. In *Ingalls Shipbuilding v. United States*, 13 Cl. Ct. 757 (1987), this court said:

> Government is not just a player in the legal and social marketplace, but it is the sovereign; the institution entrusted to act as the representative of the whole Nation and in the Nation's interest. The sovereign is the ultimate source of positive law and political legitimacy. It is the umpire and scorekeeper as well as a significant player in this market-place.

Id. at 761. Federal contract law, including the law of breach, has developed and changed over the years to reflect the particular concerns of the sovereign and its

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[8] The Federalist No. 15, at 108 (W. Kendall & G. Carey ed.) (emphasis in original).

relationships with its contractors. As a result, federal contract law is not just a branch of the common law of contracts, but is a separate tree.

Suits by the sovereign in sovereign-contractor disputes are also not traditional suits at common law because federal contract law did not exist at common law. The term "common law" has long been synonymous with the law of England as it was during the time of the framing of the Constitution. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222-23 (1818); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). Black's Law Dictionary defines the common law to be "that portion of the common law of England (including such acts of parliament as were applicable) which had been adopted and was in force here at the time of the revolution . . ." Black's Law Dictionary 346 (4th Ed. 1968) (quoting *Industrial Acceptance Corp. v. Webb*, 287 S.W. 657, 660 (Mo. App. 1926)). It follows from the above that federal contract law is not synonymous with the common law of England, rather, the common law of England is that law adopted by the states and applicable in state law disputes between private parties, *Northern Pipeline*, 458 U.S. 50 (1982), or in federal law disputes where there is no strong federal interest. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *De Sylva v. Ballentine*, 351 U.S. 570 (1956); *Bank of America Nat. Trust & Savings Ass'n v. Parnell*,

352 U.S. 29 (1956), *see also, Miree v. Dekalb Co.*, 433 U.S. 25 (1977).[9]

The thought that common law is synonymous with state law was recently reflected by Chief Justice Rehnquist in *Northern Pipeline* where he said that state law contract actions are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Northern Pipeline*, 458 U.S. at 90 (Rehnquist J. concurring); *see also Thomas*, 473 U.S. at 587.

Plaintiffs rely upon the fact that England sued its subjects for breach of contract in its courts upon writs of debt. This does not, however, support the plaintiffs' position. The states are the entities that adopted the common law of England, not the federal government. It was said early on that:

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[9] In *Clearfield Trust*, the Court held that federal law applied in cases involving the rights and duties of the United States on commercial paper issued by the United States. The United States had a strong interest in a uniform rule of law in the area of federal commercial paper. The *De Sylva* case involved the question of whether an illegitimate child was entitled to share in copyrights which came up for renewal during the widow's lifetime. The Court held that because there is no federal law of domestic relations, state law should be used to construe the word children as used in the Copyright Act. In *Parnell*, a diversity case between private parties which involved United States bonds, the Court held that because the only interests implicated were those of private parties, state law should apply.

> [I]t is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.

Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834). In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) the Supreme Court reaffirmed this notion that there is no general federal common law. The court said "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case [in federal court] is the law of the state . . . ." *Id.* at 78. *Erie* supports the conclusion that the federal contract law is different from the common law. Federal contract law is founded on the Constitutional powers of the federal government and not the law of the states.

At this point it is important to note that there are several definitions of common law, each based upon a particular purpose. The definition of common law as the law of England and of the states is applicable to Article III questions. The definition of common law as judge made law merely distinguishes that body of law from statutory and constitutional law, and in this sense there is a federal common law. *See Clearfield Trust Co.*

v. United States, 318 U.S. 363 (1943) (federal courts fashioning federal common law when the United States exercises a constitutional function and the applicable Act of Congress or constitutional provision does not cover the question involved). This federal common law though is not synonymous with the English common law; it is, rather, law created by the federal courts to fill in interstitially the federal constitutional and statutory law. In the area of federal contract law it does this, as well as interpreting contractual meaning.

Calling the claims involved in this case government breach of contract claims does not help plaintiffs' cause. The court's concern must be with the substance of these claims. *Commodity Futures Trading Comm. v. Schor*, 106 S. Ct. 3245 (1986); *Thomas*, 473 U.S. at 587. The substance of these claims, as noted above, is not state law, or common law as the Framers understood it, nor are they breach of contract claims between private parties such as would fall solely within the Article III judicial power. Rather, they are claims created by the unique federally created sovereign-contractor relationship.

Furthermore, to the extent that plaintiffs rely upon *Commodity Futures* that reliance is misplaced. In *Commodity Futures* the Court found that the claim was state law based but that there had been a waiver of any rights to Article III adjudication. The Court then went on to hold that there was no violation of the unwaivable structural concerns underlying the separation of powers

doctrine. Here the court is of the opinion that this case does not call for an application of Article III judicial powers and so the court does not need to apply the *Commodity Futures* balancing test to the structural concerns, if any, implicated by these cases. In fact, *Commodity Futures* weakens the plaintiffs' argument since it holds that even if some common law elements are involved in a claim, an Article III forum may not always be mandated.

2. *The "public rights" exception*

Several exceptions to required Article III adjudication were noted in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). There the Court specifically recognized four areas where the judicial power was not exclusively exercised by Article III judges; the territorial courts, where Congress' power to "make all needful rules and regulations respecting the territory" enabled it to require adjudication of typical Article III type cases in a legislative court; the District of Columbia courts, whose power was derived from Congress' control over the District; the Courts Martial, where the Constitution conferred upon Congress the power to make rules for the government and regulation of the land and naval forces; and the "public rights" exception first discussed in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). Of these, only the "public rights" exception is applicable in this case.

The court is of the opinion that the instant cases fall squarely within the "public rights" rationale and so, for this reason also, do not require an exercise of the judicial power reserved to the Article III courts. In an oft repeated quotation from *Murray's Lessee*, Justice Curtis laid out the beginning of the "public rights" doctrine:

> (We) do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Murray's Lessee, 59 U.S. at 284.

In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Court further explained the doctrine:

> Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of

> it. The model of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Id. at 451 (footnote omitted).

And in *Crowell v. Benson*, 285 U.S. 22 (1932), Chief Justice Hughes in distinguishing private versus public rights wrote "the distinction is at once apparent between cases of private rights and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 50. The Court went on to define private rights as "the liability of one individual to another under the law as defined." *Id.* at 51.

It is clear that the government is a party to this litigation in its capacity as the sovereign. Although to a certain extent it is also true, as plaintiffs contend, that the United States does carry some attributes of a private party into litigation. For instance, the United States cannot resolve disputes by legislative or executive fiat; it must provide procedures, which it must follow, through which the rights of both parties are protected. *See Perry v. United States*, 294 U.S. 330 (1935).

There is nothing in the concept that the United States acts like a private party in its claims against its contractors which mandates that the United States must

sue in an Article III court. The concept merely requires that the United States not summarily declare a party in breach of contract. It requires proper procedures consistent with the mandates of due process. These procedures are met by initial placement of government breach of contract claims in the Claims Court or Boards of Contract Appeals with unified review in the Article III United States Court of Appeals for the Federal Circuit. *See Ingalls Shipbuilding Co. v. United States*, 13 Cl. Ct. 757 (1987).

These cases also involve a constitutional function of Congress as required by *Crowell*. Under Article I, section 8 of the Constitution, the legislature has delegated to the executive the power to "conduct the business of the people,"[10] by entering into contracts for the sale of United States property and the purchase of goods and services by the United States. No one can argue that Congress does not have the power to do so. *Allegheny County*, 322 U.S. at 182. Therefore, this case arises between the government and a private party in connection with the constitutional functions of the executive and legislative branches.[11]

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[10] Defendant's Response Brief at 18 (filed December 15, 1986).

[11] In *Crowell* the court said "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the congressional power as to interstate commerce, taxation, immigrations, the public lands, public health, the facilities of the post office, pensions and

The Agriculture Board of Contract Appeals has reached the same conclusion on the identical issue. *See Gregory Timber Resources*, 87-3 BCA (CCH) ¶ 20,086 (Aug. 26, 1987), *appeal docketed*, No. 87-1598 (Fed. Cir. Sept. 2, 1987). In *Gregory Timber* the Board relied upon a line of Supreme Court cases holding that claims arising under federal contracts do not necessarily need Article III determination. *See United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1875); *United States v. Wunderlich*, 342 U.S. 98 (1951); *United States v. Moorman*, 338 U.S. 457 (1950). The Board concluded that matters arising under government contracts could be determined by non-Article III tribunals.

Reliance upon past cases where the government brought suit in the district courts under 28 U.S. § 1345 (1982) for breach of contract does not prove convincing. Because the sovereign could, prior to the CDA, and pursuant to congressional will, sue for breach of contract in the Article III courts as well as in the state courts, does not mean that jurisdiction must be lodged in those courts. *See Crowell*, 285 U.S. at 53. The CDA, which does not create statutory breach of contract claims, but rather establishes direct access jurisdiction over government claims in the Claims Court, could have, like section 1345, provided for jurisdiction over government breach of contract claims to be placed in the District Courts. It, however, did not. The court believes these

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payments to veterans." 285 U.S. at 51 (footnote omitted).

government claims are of the sort susceptible to both Article III and Article I adjudication.

The case of *United States v. Wilkins*, 19 U.S. (6 Wheat.) 135 (1821) cited by plaintiffs lends no further support to plaintiffs' position. Justice Story in that case said:

> [I]f there be no specific price agreed upon in the contract for rations issued at any place, the contract leaves the price to be adjusted by the government and the contractor. It is to be the joint act of both parties, and not the exclusive act of either. If they cannot agree, then a reasonable compensation is to be allowed, and that reasonable compensation is to be proved by competent evidence, and settled by a jury, as in common cases . . . .

Id. at 142-43. It is clear that Justice Story was talking about factual findings by a jury in a District Court setting, a traditional function of the District Courts when acting as courts of law. There is nothing in his opinion declaring that government claims must be placed in the District Courts. This reading is consistent with the long-standing notion that if Congress places a federal cause of action in District Court, findings of fact are to be made by a jury.

The court's holding that jurisdiction over these government breach of contract claims is properly lodged in this court is consistent with Court of Claims and Federal Circuit precedent binding upon this court. In

Maryland Casualty Co. v. United States, 135 Ct. Cl. 428, 141 F. Supp. 900 (1956), the Court of Claims held that it had jurisdiction over a purely government claim against a third party who had no claim against the government. Similarly, the Federal Circuit in *Rush v. United States*, 804 F.2d 645 (Fed. Cir. 1986) upheld a government claim brought in this court against a third party with no claim against the government. In *Rush* the third party argued that the Claims Court could not exercise the Article III judicial power required to adjudicate the government's claims. The court upheld the government claims concluding that "this case involves public rights, i.e., a matter arising between the government and person subject to its authority in connection with the performance of the constitutional functions of the executive and legislative branch and which historically could have been determined exclusively by those branches." *Id.* at 647 (citations omitted).

C. *Does the Seventh Amendment require a jury trial in these cases?*

Plaintiffs argue that the Seventh Amendment provides them with a right to trial by jury. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." This argument has been made several times throughout the history of the Court of Claims and the Claims Court. *See McElrath v. United States*, 102 U.S. 426 (1880);

Rush v. United States, 804 F.2d 645 (Fed. Cir. 1986). The cases have all held that the argument has no merit. In *McElrath* the Supreme Court found that government counterclaims were not suits at common law and that a jury trial in the Court of Claims was, therefore, not required. Similarly, the Federal Circuit in *Rush* summarily denied a third party defendant's argument that it was entitled to a jury trial. *Rush*, 804 F.2d at 647. Because this court holds that the government's breach of contract claims both involve "public rights" and are not suits at common law requiring an exercise of the Article III judicial power, it follows that a jury trial is not required.

Tull v. United States, 107 S. Ct. 1831 (1987) does not require a different result. In *Tull*, Congress created, in favor of the government, a statutory civil penalty for violators of the Clean Water Act. The district court allowed the government to proceed without a jury and the court found the defendant liable under the Act. The Supreme Court held that in actions analogous to suits at common law, even when federally created, the Seventh Amendment requires liability to be determined by a jury. The difference between *Tull* and the present case is that in *Tull* Congress established a federal cause of action and placed it in a district court where provisions for a jury trial exist. If Congress puts a federally created cause of action analogous to an action at common law in the district courts then *Tull* requires a jury trial. However, this court does not read *Tull* to mean that

where Congress properly puts a federal cause of action, an action involving "public rights," or an action otherwise not strictly within the judicial power, in an administrative agency or a legislative court, a jury trial is required. Such a reading would be inconsistent with prior Supreme Court decisions which *Tull* gave no hint of overruling. *See Atlas Roofing Co. v. Occupational Safety & Health Comm.*, 430 U.S. 442 (1977); *Pernell v. Southall Realty*, 416 U.S. 363 (1974), *Block v. Hirsh*, 256 U.S. 135 (1921); *Crowell v. Benson*, 285 U.S. 22 (1932).

The plaintiffs' motion to dismiss the government counterclaims is denied. However, as these cases involve an interlocutory order, and a controlling question of law with respect to which there may be a substantial ground for difference of opinion, an immediate appeal from the order entered herein may materially advance the termination of this litigation. Accordingly, this opinion is certified for immediate appeal pursuant to 28 U.S.C. § 1292 (d)(2) (1982), should plaintiffs seek such appeal.

/s/ Loren A. Smith
LOREN A. SMITH
Chief Judge

APPENDIX D

United States Constitution, Article III, Sections 1 and 2

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .; to Controversies to which the United States shall be a Party; . . .

United States Constitution, Amendment VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 171(a)

> The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as

the United States Claims Court. The court is declared to be a court established under article I of the Constitution of the United States.

28 U.S.C. § 172

(a) Each judge of the United States Claims Court shall be appointed for a term of fifteen years.

(b) Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States.

28 U.S.C. § 176

(1) Removal of a judge of the United States Claims Court during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.

28 U.S.C. § 1491

. . . The Court of Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

41 U.S.C. § 605(b)

> The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. . . .

41 U.S.C. § 609(a)(1)

> Except as provided in paragraph (2) [applicable only to actions involving the Tennessee Valley Authority], and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.